IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953

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No. 562

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ANNE HALBACH BUMSTED AND MARY ELIZABETH KEMMERER, Successors in Interest to Elizabeth S. Halbach and Franklin H. Stafford, Trustees under Agreement of Trust Made by Ernest K. Halbach, dated December 6, 1940, *Petitioners,*

v.

JAMES E. MARKHAM, as Alien Property Custodian, *Respondent.*

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## REPLY BRIEF FOR THE PETITIONERS

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Petitioners submit this reply brief to avoid the possibility that this Court might be concerned by certain significant misstatements and evasions in and an omission from the government's brief in opposition. The matters which require clarification and correction are as follows:

1. A fundamental misstatement of *fact* on the content of the record is the basis of the defense the Government offers to both the charge of overreaching or duress and

the lack of authority under the law to treat the Halbach property as both enemy and non-enemy at the same time.

The government's second question presented rests on the assertion that here the Attorney General and the Custodian were "relinquishing to the plaintiff the portion of the property agreed by the compromise to be non-enemy, and retaining the remainder, agreed to be enemy" (Br. in Opp. 2). The argument under this second question likewise rests on the assertion that the Custodian was retaining a portion of the stock "which for settlement purposes was conceded to be enemy" (Br. in Opp. 22, 23).

This non-existent "concession" is used to justify the threat to "trip" the option as merely "stating the Government's legal position" (Br. in Opp. 15) and the return of the option price only to the Halbachs as an agreed "non-enemy interest" under the law.

But the fact of the agreement or concession which the Government made crucial to its position does not exist. On the record there is no such agreement or concession by the Halbachs in any form. There is, and never has been any agreement (or proof) that the General Dyestuff Corporation options were owned by the enemy either in the judicial or the administrative record. (See Shafer, R. 64-65).

This is, very importantly for the rights of citizens, the Government's accusation against the Halbachs—an accusation which is tantamount to a charge of disloyalty—and which in this very proceeding the Halbachs—U. S. citizens—ask the right to try to clear by trial in the courts for the first time (after understandably waiting as long as the Statute of Limitations would permit them toward the time when a treaty of peace with Germany might be signed and their case to try without prejudice).[1] This is the very cen-

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[1] No treaty of peace has yet been made with Germany. A Joint Resolution ending the state of war with West Germany was not passed until October 19, 1951, nearly ten months after the original motion in this proceeding on January 25, 1951 (R. 2, 17-19).

tral issue of the fact which the Halbachs want to try, and the Alien Property Custodian has evaded trying in the court on its merits.

But nowhere in the record has there ever been any agreement or concession to this accusation of disloyalty which the Government now without any citation to the record boldly asserts as an agreed fact with the attendant legal consequences both for the issue of duress and overreaching and the issue of the Government's powers under the law. If there had been any such concession, there is no case for the Halbachs to try on the merits in a court. This "sharp practice"[2] like all the rest of the treatment of the Halbachs by their Government is, to use words of the present Alien Property Custodian, something to "be deeply regretted by all of us, citizens and public officials too."

The record is affirmatively contrary to the respondent's assumption of such agreement. The only reference in the record concerning any agreement in connection with the settlement is Paragraph 5 of the final agreement and release itself. Paragraph 5 expressly states (R. 15):

> "It is expressly understood that neither the making of this Agreement nor its consummation constitutes any admission, either express or implied, by either party to the Agreement of the correctness of the position

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[2] Final Report of the Subcommittee to Examine and Review the Administration of the Trading With the Enemy Act of the Committee on the Judiciary, United States Senate (this report later adopted by the full Committee on the Judiciary), at pages 33, 35:

"Equitable adjudication of claims by the Office of Alien Property has been attacked in hearings before the subcommittee on the ground that such adjudication has been, in certain cases, subject to coercion, under [undue] influence and sharp practice against the claimant. These charges have been substantiated and the following cases presented in subcommittee hearings represent proof of this assertion:

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"Claims of General Dyestuff Corp. Stockholders"

of the other party to the Agreement on the law or on the facts.'"[3]

The insertion of Paragraph 5 in the settlement agreement is the clear proof that there was no "agreement or concession" on the part of the Halbachs to the enemy character of the options or the stock of General Dyestuff Corporation. If there had been such a concession the Assistant Attorney General, conscious of the Government's difficulties under the law, would, in exercising due care have made such concession explicit by way of stipulation in the settlement agreement to bolster the Government's bizarre legal position. But significantly not only was such a stipulation bolstering the Government's position omitted from the settlement agreement but instead there was affirmatively inserted in Paragraph 5 an express denial of any such agreement or concession.

The government's argument based on this fundamental misstatement of fact makes it appear that the dispositive issue in the case has to do with a division of interests in property rather than a determination of the eligibility of a claimant under Section 9(a).

Section 9(a), under which the Halbachs' suit was instituted, speaks in terms of the claimant and not in terms of the property. If a claimant is non-enemy and not "tainted" he is entitled to the return of his property, and if he is

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[3] Another gratuitous assumption from a non-existent record is the Government's assertion that "Other stockholders, whose stock, subject to the same option had also been vested, also found the offer fair * * * " (Br. in Opp. 20). So far as petitioners are aware and so far as the record reveals the "other stockholders" who received the same offer have not yet ventured nor been requested to venture their opinions. The release by such stockholders was identical with that signed by the Halbachs and included the same Paragraph 5 above. Mrs. St. George, of course, whose stock, subject to the same option, had also been vested on the same theory, received over three times $118 per share for her "calculated non-enemy interest".

"enemy" or "tainted" he is not entitled to any return. It is to hurdle this obstacle that the government has obviously seized upon the expedient of looking to the character of the property and declaring its divisibility by "agreement." This the government necessarily must do because, if it gives weight to its previous dubbing of the claimants as "enemies" in the vesting process, then it would have no power or right to bargain with or return property to such enemies. In its brief the government has obviously avoided this question, and instead it merely assumed an "agreement" and that such a return is authorized under the law (Br. in Opp. 26).

The government's improvised straddle will not fit its action in the General Dyestuff situation as a whole. Compare the treatment of stockholders St. George and Duisberg, both United States citizens like the Halbachs. Each held the very same stock subject to the very same options as the so-called Halbach stock. This stock, which the government claims is simply divisible into calculable enemy and non-enemy interests based on the option and option price of $118 per share, was "calculated" for St. George's purposes as having a non-enemy interest of $365 per share as against the comparable non-enemy interest of the Halbachs of $118; and as far as Duisberg was concerned his non-enemy interest was "calculated" at zero and all of the stock was deemed to be enemy with no non-enemy interest.

The inconsistency of the government's improvised position is also demonstrated by the real effect of the argument about the tax benefits received by the Halbachs, which argument is thrown into the respondent's brief to divert attention from the real issues (Br. in Opp. 20). The real significance of this new tax argument is to establish the illegality of the settlement one way or the other. Either the government is taking the position that special tax concessions were made to Halbach to induce the "settlement", thus illegally applying tax monies of the government to the purchase of enemy property at a price which was not a "calculated non-enemy interest of $118" but a price as in-

definite as the value of the tax favors. Or, if the government gave the Halbachs nothing to which they were not entitled so far as taxes were concerned, then the very discussion in the negotiations of the Halbachs' tax problems is proof, as was pointed out in our petition (Pet. 15) that the threat of making "tax trouble" for the Halbachs unless they consented to sell their property for the government's price was used as a conscious element in the government's duress and overreaching upon the Halbachs.[4]

In view of the foregoing it would now appear clear beyond a doubt that what the government softly asserts (Br. in Opp. 15) was a mere statement of a "legal position"—"that the Custodian could bring about a situation in which he could exercise the option"—was, in fact, a proposal of a plan to "trip the option" and did, in fact, constitute an overreaching threat to relegate the Halbachs to a claim against the proceeds of a sale at the option price. This in itself proposed an illegal course of action which *per se* constitutes duress.

2. The government continues to urge as it did in the court below that the reservation in the vesting order of a right to return property exemplified the broad power of return

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[4] The respondent's brief points out (pp. 11, 21) as Government generosity the total salary earned by Halbach and the total profits realized by the Halbachs from the business Halbach himself spent since 1925 creating. (See Pet. 10). The fact is that Halbach, the Government-dubbed "cloak for the enemy" was (up until almost the very time his daughters filed their suit) by reason of his recognized ability employed by the Government to run his children's own corporation at a salary far less than he had been earning prior to the vesting. An interesting comparison may be made to the salaries and perquisites paid to personnel appointed by the Government after the vesting. See Report of the Sub-committee of the Senate etc., pages 52-53.

But the real significance of Halbach's salary is another Government inconsistency. If Halbach really was a "cloak for the enemy" why did the Government employ him in charge of a sensitive chemical business during the war?

which the Custodian construed Section 5(b) as giving him (Br. in Opp. 23; R. 8-9, 75-76). But the government does not disclose that substantially this same form of vesting order was still being used by the Custodian at the time he himself appeared before a subcommittee of the House Judiciary Committee and *asked for legislation authorizing him to make returns.*[5] Thus we now find the Department of Justice in the curious position of urging one administrative interpretation of Section 5(b) to influence the decision of the courts below and of this Court, after urging a directly contrary administrative interpretation of the same section to influence legislation.

This extreme flexibility of administrative interpretation is again demonstrated in the brief in opposition itself. On page 25 the government says: "It is of no moment that Section 32 may [after this transaction] have limited the power to make administrative returns * * *." However, the Custodian and the Attorney General sought the enactment of Section 32 to *enlarge* the power to make administrative returns of vested property, not to *limit* that power,[6] and at that time Section 5(b) had been a part of the law for almost four years. Now, in an effort to sustain an unconscionable bargain, administrative interpretation makes the *enlarging* statute the *limiting* statute. The government does not deny the charge in our petition (Pet. 24, 25-27) that this is the only case in which this radically different administrative construction of Section 5(b) has been urged. Only a decision by this Court construing Section 5(b) as it relates to the other portions of the Trading With the

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[5] Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 79th Cong., 1st sess., on H.R. 3750, at pp. 7-8.

[6] Hearings, *supra*, at p. 3. See also the representation made to this Court by the government in its petition for certiorari in *Clark v. Uebersee Finanz-Korp.*, No. 35, October Term, 1947, at pp. 8-9, to the effect that the Custodian's power to return vested property rested on Pub. L. 322, 79th Cong., 2d sess., which added Section 32 to the Trading With the Enemy Act.

Enemy Act can put an end to such administrative "backflips."

3. We maintain in our position that the question as to the enemy or non-enemy status of a 9(a) claimant is not subject to compromise, even under the Attorney General's implied power to compromise government litigation in certain circumstances (Pet. 8, 30-33). The government's response is that "neither Section 5(b), Section 9(a), nor Section 12 *prohibits* the Attorney General from exercising his normal authority to settle and compromise Government litigation" (Br. in Opp. 28; emphasis in original).

This response evades the issue. The question is not whether those sections expressly prohibit a compromise by the Attorney General of a 9(a) suit. Rather the issue is whether, if under the Trading With the Enemy Act the Custodian could not have lawfully disposed of this vested property as was done here, the Attorney General may lawfully do so under his power to compromise.

The government cravenly refuses to confront this issue in a forthright manner, while still seeking covertly to preserve its position by a parenthetical remark in another connection—that Section 32 limited the power to make administrative returns "(other than those made in the course of settlements of litigated cases)" (Br. in Opp. 25). This claim by the Attorney General of the power to disregard the limitations in Section 32 on the disposition of vested property when he settles 9(a) suits is exceedingly bold. It forecasts the manner in which the decision below freeing the Attorney General from the limitations in Section 9(a) on dealing with enemy claimants will be extended by the government to free the Attorney General likewise from the limitations in Section 32. The care with which this bold claim has been tucked away in an unrelated portion of the government's brief underscores the importance of reviewing the decision below and forcing the Attorney General to justify his claim that he is entitled to operate beyond the law.

The enemy/non-enemy "interests" in the General Dyestuffs stock are now obviously an after-contrived rationalization to deny the right to a trial in court on an issue of disloyalty to citizens whose only real offense is that the Alien Property Custodian needs their property to make other property operated by the Custodian more profitable. It is again submitted that the Trading With the Enemy Act did not authorize the dirty business of the confiscation of U.S. citizens' private property just to help the Alien Property Custodian's Office make money in competitive private business.

The very inconsistencies, evasions and cover-ups in the Respondent's brief are proof to this Court that "there is something rotten in Denmark" about this General Dyestuffs Corporation situation which should impel this Court to find grounds to let a lower court try the issues of fact on their merits.

**Conclusion**

For the foregoing additional reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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